STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 7, 2011
v	No. 295406 Wayne Circuit Court
JOHN MARK JEFFRIES, Defendant-Appellant.	LC No. 09-012420-FC

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 35 to 65 years for the murder conviction, 12 to 20 years for the assault-with-intent conviction, and 3 to 20 years for the felon-in-possession conviction. He was also sentenced to a consecutive 2-year prison term for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied a fair trial by the trial court's erroneous instruction of the jury. The parties agreed upon a set of jury instructions and presented those instructions to the trial court, the trial court read the jury instructions as provided, and both parties stated on the record that they were satisfied with the instructions. Accordingly, we conclude that this argument has been waived. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

Defendant next argues the prosecution failed to disprove his claim of self-defense beyond a reasonable doubt. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

To be entitled to the defense of self-defense, an individual must have acted out of an honest and reasonable belief that the use of deadly force was necessary to prevent his imminent

death or imminent great bodily harm. *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002). A defendant acts in self-defense when he "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The use of deadly force in self-defense is justified if (1) the defendant honestly and reasonably believed that he was in danger, (2) the danger which the defendant feared was serious bodily harm or death, and (3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend himself. MCL 780.972; MCL 780.961; *Heflin*, 434 Mich at 502. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). A prosecutor may meet this burden by presenting sufficient evidence for a reasonable trier of fact to conclude, beyond a reasonable doubt, that the defendant's belief of imminent danger was either not honest or was unreasonable. *Id.*

Viewing the record in a light most favorable to the prosecution, we conclude that the evidence was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant did not act in self-defense. Gregory Romej testified that defendant pulled out a gun and pointed it at the victim, Gregory Bradley's, face. Thereafter, Wayne Slanaker, Jr., and defendant got into a fight, and defendant shot Slanaker while they were fighting. When Slanaker fell to the ground, defendant turned and shot the victim three times in the back. After shooting the victim and Slanaker, defendant followed Romej into the living room and shot at Romej as he dove for cover behind a couch. A rational trier of fact could have concluded beyond a reasonable doubt that defendant's belief of imminent danger when he shot the victim and shot at Romej was not honest or reasonable because neither the victim nor Romej attempted to fight defendant. Although defendant offered a differing version of events, the jury heard the evidence presented by each side and determined the credibility of the witnesses. It is the province of the jury to determine the weight and credibility of the proofs presented, *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998), and this Court will not resolve credibility determinations anew on appeal, *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant also argues the prosecution committed misconduct while cross-examining him. Again, we disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003); see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting the defendant's substantial rights, a defendant must prove that prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *McLaughlin*, 258 Mich App at 645.

Prosecutorial misconduct claims are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutors are generally given great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The thrust of a prosecutorial misconduct analysis is to determine whether the defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005).

Regarding defendant's argument that the prosecution improperly inquired into his arrest, the prosecution asked him during cross-examination:

> *Q.* But yet up until you were arrested, you never once from '06 to April, you never once told police what happened, I'm a victim; did you, sir?
>
> *A.* No.
>
> *Q.* And your family members told you that the police were looking for you?
>
> *A.* They told me I was wanted for an investigation for questioning on a homicide.
>
> *Q.* Well, for just some questioning, but yet you don't think, oh, they may think I had something to do with it?
>
> *A.* I didn't know. I did not think that, no.
>
> * * *
>
> *Q.* You didn't tell the cops though I'm afraid, the dead man's got a hit on me; did you?
>
> * * *
>
> *A.* I didn't tell them that [the victim] had a hit on me, no.

Contrary to defendant's argument, the prosecutor was merely highlighting the weaknesses of defendant's self-defense claim by asking him why, if he was the victim as he claimed, he did not seek out the police before his arrest. It is well settled that a prosecutor may comment on the weaknesses of the defendant's theory. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). We perceive no misconduct in this regard.

With respect to the prosecutor's questions regarding defendant's children, defense counsel brought out on direct examination that defendant had three children, ages ten, eight, and twenty months. Thereafter, on cross-examination, the prosecution asked defendant if he was thinking of his children when he went to Slanaker's house to purchase marijuana. Contrary to defendant's assertions, the prosecutor was not introducing "other acts" evidence during cross-examination. Prosecutors may argue the evidence and all reasonable inferences that arise therefrom in relationship to their theory of the case, and need not confine their arguments to the blandest possible terms. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). After reviewing the record and the allegedly improper comments in context, it strikes us that the prosecutor was simply responding to evidence that defense counsel had already introduced during direct examination. *Thomas*, 260 Mich App at 454. We perceive no misconduct in this regard, either.

Furthermore, the trial court instructed the jury that defendant was innocent until proven guilty, that the prosecution was required to prove each element beyond a reasonable doubt, and that the attorneys' statements, questions, and arguments were not evidence. Jury instructions are generally presumed to eliminate any possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Defendant has failed to show plain error requiring reversal.

Defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial court level, our review is limited to errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). The defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Counsel's decisions regarding how to proceed at trial, what evidence to present, and which jury instructions to request are generally considered to be matters of trial strategy, and this Court will not second-guess such decisions with the benefit of hindsight. See, e.g., *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003); *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999).

We cannot conclude that defense counsel's failure to object to the prosecution's cross-examination of defendant regarding his claim of self-defense or his children constituted ineffective assistance of counsel. As previously discussed, the prosecution did not commit misconduct, did not introduce any improper "other acts" evidence, and asked proper questions during its cross-examination of defendant. Counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Moreover, defendant has not proven that counsel's failure to object to the jury instructions constituted deficient performance. We find that the jury instructions were properly given, see *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007); *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), and defense counsel was therefore not ineffective for failing to object to them, *Milstead*, 250 Mich App at 401. Quite simply, defendant has not overcome the presumption that counsel's actions constituted sound trial strategy.

Defendant next argues that the trial court erred by improperly scoring offense variables (OVs) 3 and 6. We disagree. We review de novo the application of the sentencing guidelines, but review a trial court's scoring of a sentencing variable for an abuse of discretion. *People v*

Cannon, 481 Mich 152, 156; 749 NW2d 257 (2008); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *Id*. This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Under OV 3, 25 points may be assessed if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). Under the reasoning of *People v Houston*, 473 Mich 399, 405-407; 702 NW2d 530 (2005), 25 points may be assessed when the victim in a homicide case has sustained a life-threatening or permanent incapacitating injury. Here, the victim was shot three times in the back, resulting in life threatening injuries. We must follow the rule of law established by the Michigan Supreme Court, *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987), and therefore decline defendant's request to revisit or voice disagreement with *Houston*. The trial court correctly assessed 25 points for OV 3.

Under OV 6, 25 points may be assessed if "[t]he offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result," MCL 777.36(1)(b), but only 10 points may be assessed "if a killing is intentional within the definition of second degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent," MCL 777.36(2)(b). As correctly noted by the trial court, MCL 777.36(2)(a) provides that "[t]he sentencing judge shall score . . . [OV 6] consistent with a jury verdict unless the judge has information that was not presented to the jury." The jury found defendant guilty of second-degree murder, and the evidence presented at trial suggested that defendant's shooting of the victim was not in a combative situation. Rather, defendant shot the victim in the back three times after his fight with Slanaker was over. Thus, the trial court did not abuse its discretion by assessing 25 points for OV 6. Because there was no error in the scoring of defendant's offense variables, defendant's minimum guidelines range is correct and he is not entitled to resentencing. See *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Finally, defendant's assertion that the Presentence Information Report (PSIR) is inaccurate and requires resentencing has been abandoned on appeal. Indeed, defendant has failed to articulate what information in the PSIR needs correction. A defendant may not merely announce an error and leave it to this Court to discover and rationalize the basis of his claims. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood